COURT OF APPEALS.

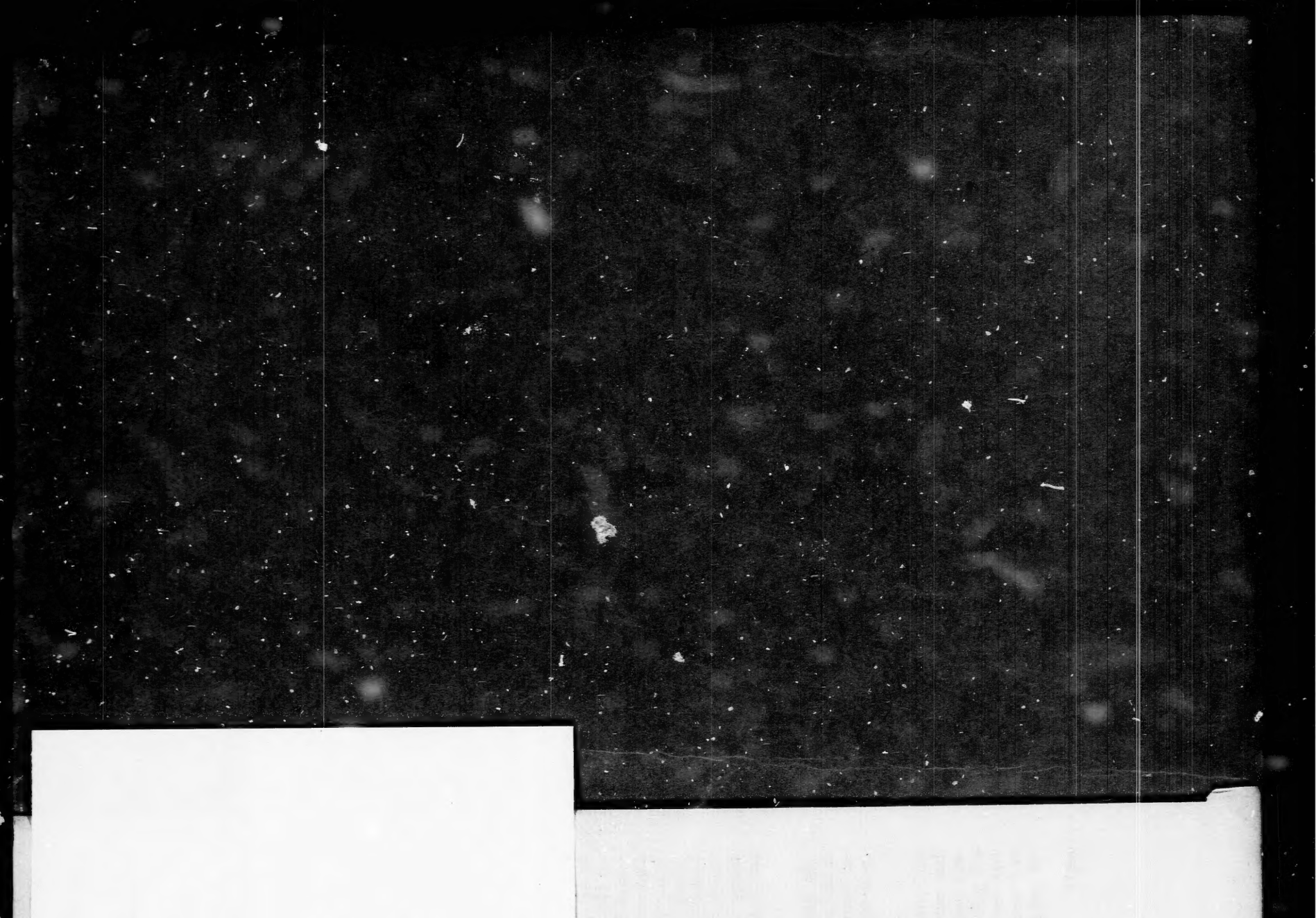
Daniel Ayer, (Plaintiff in the Court below,) APPELLANT,

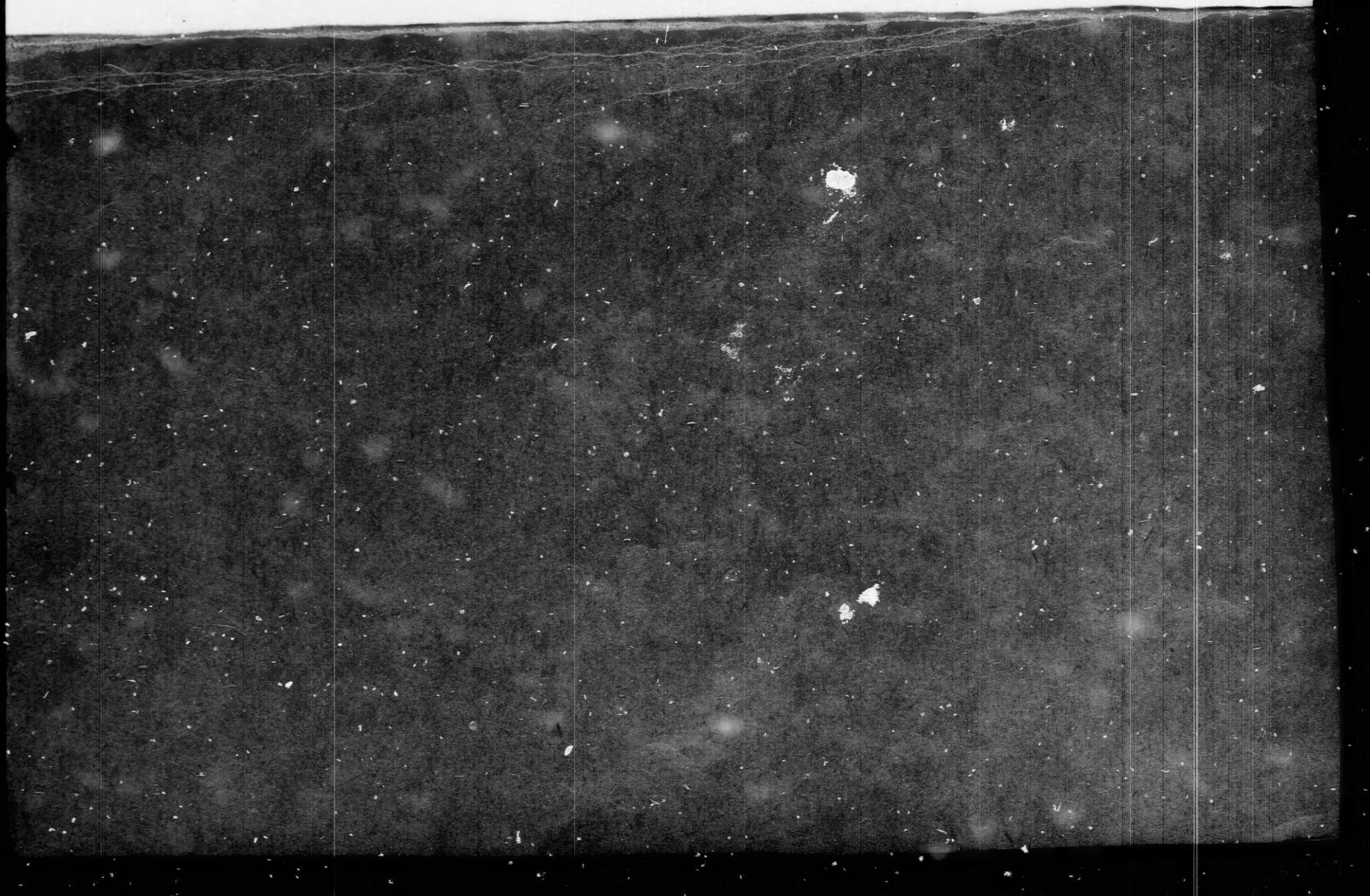
and

James M'Douall and John Goudie, (Defendants in the Court below,)

RESPONDENTS.

CASE OF THE RESPONDENTS.





PROVINCE OF LOWER-CANADA. } *Court of Appeals.*

In a Cause between

DANIEL AYER, (*Plaintiff in the Court below,*) APPELLANT,

AND

JAMES M'DOUALL, AND JOHN GOUDIE, (*Defendants in the Court below,*) RESPONDENTS.

Case of the Respondents.

IN the year 1815, the above named Respondents having contracted with his Majesty's Government for the building of Frigates, and other armed Vessels, to navigate Lake Champlain, entered into a number of contracts with lumber dealers, for the obtaining of a large quantity of timber of various descriptions to enable them to accomplish their engagements.—Amongst others, they contracted by written articles of agreement, bearing date the 1st February 1815, with the present Appellant, "for "the delivery by him, unto them, at St. John's, into a yard to be pointed "out by the Respondents, on the upper side of the garrison, or lower "side, or in the garrison, at their option, of 10,000 feet White Oak "Timber, 5000 feet White Elm Timber, and ten thousand feet of "White Pine Timber; *to be sound, good, and fit for the purpose of build-* "*ing Frigates, Ships, and Gun-boats, on Lake Champlain; and to be* "*such Timber as should be approved by Mr. John Gill,* as proper for "that purpose, or any person he might appoint for the purpose of inspect- "ing and measuring the said Timber, to be flatted or squared, and to "be delivered in the following manner: that is to say, 10,000 feet in the "yard appointed by the 25th February 1815, and the remainder of the "whole quantity of 25,000 feet, on or before the first day of May (then) "next, at the rate of two shillings per cubic foot for the Oak and Elm "Timber, and one shilling for the Pine Timber."—To enable the Apellant the better to fulfil his engagement, the Respondents engaged to pay "the probable amount of Timber hauled out each two weeks, until he "should be paid £1000, and the balance when the delivery should be "completed, on the 1st May 1815."

No. 15 of Record.

John Gill, the person named in the contract, was the person who inspected all the Timber used in the building of Vessels for His Majesty's Service on Lake Champlain.

In the course of the winter 1815, a quantity of Elm, Oak and Pine Timber was brought by the Appellant to the fort of St. John's, and deposited on the South side of that fort.

Moneys were advanced from time to time under the above clause of the contract, to the amount of £750 0 0, as follows:—

No. 7.——10th February 1815.....	£250	0	0
No. 12.——18th February 1815.....	250	0	0
No. 8.——25th February 1815, by Scofield	200	0	0
No. 9.—— 2d June 1815	50	0	0
Blankets furnished in course of winter	50	0	0

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In the month of May 1815, John Gill went with James M'Douall and one Millard, who acted as the agent of the Appellant, to examine the Timber upon which these large advances had been procured, for the purpose of ascertaining whether *it was sound, good, and fit for the purpose of building Frigates, Ships, and Gun-boats, on Lake Champlain.*

John Gill, with Robert Dent, a sworn culler, " walked over the said " Timber two or three times, and examined it stick by stick as they went " along; after which the said John Gill declared the whole of the Oak " and Elm, with the exception of a few sticks, and some part of the Pine " to be wholly unfit for the purpose of building Vessels for the Govern- " ment, and not conformable to the contract between the said parties;" and " condemned the whole of the said Timber as being unfit for building " Frigates, Ships, and Gun-boats, on Lake Champlain; some of it being " too small, some of it not sound, and some of it not being of the quality " specified in the contract." *(Deposition of Dent, No. 56 of Record.)*

It was pretended by the Appellant, in the Court below, that Gill had an interest in the Respondents' contract. But no evidence was offered to this effect in the Court below—it is contradicted by one of the Respondents upon his oath—and the opinion of Gill, as to the quality of the Timber is confirmed by Dent, and by a number of other witnesses examined in the cause.—To have ascertained whether the Timber was sound or otherwise, it would have been necessary to examine both sides, and to cut off the ends; but its deficiency in the requisite size was apparent to the eye, and Mr. Gill therefore did not deem it necessary to examine both sides, nor to cut off the ends.

After condemning the Timber John Gill went away, and Millard, who acted as the agent of the Appellant, proposed to James M'Douall, one of the Respondents, " that the said Timber, Oak, Elm and Pine, should be " measured by Dent, good and bad as it lay, and that he, the said James " M'Douall, should pay one shilling per foot for the whole of the said " Timber, Oak, Elm and Pine included; and that if, upon the arrival of " the Plaintiff, (Appellant) who was not then at St. John's, he should " not approve of the said Timber being measured by Dent, at the rate of " one shilling per foot, it should be measured and culled by a sworn " culler, and that part of it which should be found merchantable would " go on account of the contract existing between them;" to all which the said James M'Douall agreed.

Dent accordingly proceeded, in the presence of Millard and Mr. M'Douall, to measure, and at the request of Mr. M'Douall marked it with the broad arrow; Mr. M'Douall stating to him " that it would be " safer for him, and that the said mark would prevent the people from " taking it away."

" Dent was about five days in measuring the timber, and " after the " second day the said Daniel Ayer arrived and came with the said " Millard to the place where he (Dent) was measuring the said tim- " ber, and asked him, Dent, how he was getting on in measuring the " timber," and " during the greater part of the remaining three days " the said Daniel Ayer, together with the said Millard, were present at " the measurement of the said timber by Dent, coming and going oc- " casionally. *No. 56 of record.*"

Upon

Upon measuring the whole of the timber it was found to contain

12,770	ft.	Pine,			
16,137	do.	Oak,			
3,101	do.	Elm,			
32,008	at 1*s.*		£1600	8*s.*	0
Deduct Paid			£800	0	0
			£800	8*s.*	0

After the Respondents made the necessary arrangements for the building of a fleet upon Lake Champlain, Peace was concluded between His Majesty's Government and the United States of America. The building of the fleet was countermanded, and, to indemnify the Respondents for the expences which they had incurred, Government agreed to take off their hands, at a liberal price, the large collection of materials which they had made. And the lot of timber in question was accordingly delivered over by the Respondents to the proper officers of His Majesty, at St. John's. The arrangement made by the Respondents with His Majesty's Government was not concealed by them and easily reached the ears of the Appellant. The Appellant who had failed in the fulfilment of his contract and was liable to an action of damages on the part of the Respondents ; who after such failure had been present at the measurement of his timber in a way totally inconsistent with the idea of its being received under the contract ; and to whom was offered, what is proved to have been the full value of the timber and what was considered to be so by a person acting as his agent ; conceived the strange idea of recovering from the Respondents the full amount of the contract price.

To bring the claims of the Appellant to a speedy termination the Respondents consented to a reference to arbitration. And the award of the arbitrators not realizing the visionary hopes of the Appellant he brought his action against the Respondents.

The declaration contains two Special counts, the first stating the contract to be a written contract, the second a contract by parole. These Special counts are followed by the common counts for goods sold and delivered, *quantum valebant* ; the money counts, and an account stated.

The Respondent pleaded :

1. The general issue.
2. A plea of payment of all and every the sum and sums of money which were due and owing from the said James M'Douall, and John Goudie to the said Daniel Ayer.
3. The arbitration bond and award made in virtue thereof.

A general Replication was filed by the Appellant to the plea of general issue.

To the third plea the Appellant,

1. Demurred, and pleaded,
2. *Non est factum*, to the Arbitration bond.
3. A general answer.
4. No award made.
5. Illegality of award, by reason of misconduct in arbitrators in refusing to hear more than two witnesses on the part of the Appellant ; in hearing Witnesses, who were not sworn; and in making their decision to depend upon the tossing up of a copper.

The

The cause was inscribed upon the Roll of *Enquêtes*.

The contract was filed, as also various receipts and the arbitration bond and award.

The Appellant and the Respondent James M'Douall were examined upon *faits* and *articles*.

Sixteen Witnesses were examined on the part of the Appellant, and thirteen on the part of the Respondent.

The Appellant did not succeed in proving the main averments in his special counts, viz. that he did in the month of February, 1815, deliver to the said Respondents 10,000 feet of timber of the description and quality specified in the before-mentioned contract, and that he did afterwards to wit, on or before the 1st day of May following, deliver and cause to be delivered to the said Respondents the remainder of the said whole quantity of 25,000 feet, also of the description and quality aforesaid.

Upon the special counts he could not then recover.

He could only recover upon a *quantum valebant*, and it is proved that 1*s*. per foot for the whole lot of the said timber was a high price. The Appellant would therefore be entitled to the above-mentioned sum of £800, but having pleaded an award of £870, and declared his readiness to pay that sum, the Court below could not do otherwise than condemn him in that amount. The Judgment is accordingly for £870 with costs of suit.

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